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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of ELIZABETH KINNEY PESNER and GARY PESNER.	
ELIZABETH KINNEY PESNER, Respondent, v. GARY PESNER, Appellant.	G045318 (Super. Ct. No. 08D000157) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Mark S. Millard, Judge. Affirmed.

Law Offices of Andrea L. Mersel and Andrea L. Mersel for Appellant.

Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer for Respondent.

* * *

This is an appeal from a judgment in a divorce case involving a marriage that lasted just short of five years. Appellant Gary Pesner challenges four aspects about the judgment: (1) He claims the court should have joined two businesses to the dissolution proceeding in which the marital community had an interest, namely the Goldman-Pesner partnership (GP) and the IPR Fund III, LLC (IPR). (2) He claims that the trial court erred in charging him with the postseparation receipt of $137,000 of community funds without taking into account evidence that he repaid most of the money. (3) He claims that he should have received credit for $140,000 of separate property that he claims he contributed to the family home on Ridgewood Place in Yorba Linda. (See Fam. Code, § 2640, all further statutory references are to that code.) And (4) he claims the trial court abused its discretion when it imposed attorney fee sanctions of $40,000, payable at the rate of $750 a month for his conduct in frustrating the policy of the law to promote settlement or otherwise facilitate cooperation between the parties and their attorneys. (See § 271.) Challenges (1) and (3) have been waived by failure to raise the relevant arguments in the trial court. Challenges (2) and (4) fail on their merits.

FACTS

The background facts salient to this appeal are these: Gary Pesner (Gary) married Elizabeth Kinney (Elizabeth) in October 2002. During the marriage Gary worked as a self-employed real estate manager and investor. His work includes on-site property management and renovation of rental properties. Elizabeth worked as an investigator in the Orange County Coroner's Office. At the inception of the marriage Gary owned 50 percent of the Ridgewood residence, which became the couple's home. Gary's parents owned the other 50 percent. In January 2003 Gary's parents quitclaimed their 50 percent to Gary and Elizabeth "husband and wife as Joint Tenants." The same day the quitclaim deed was recorded, the Ridgewood property was refinanced. The

lender loaned Gary and Elizabeth $300,000. About $177,000 of that went to pay off the existing mortgage. The balance of some $123,000 went to Gary's separate bank account, where it was used for various community purposes. Two business entities were formed during the marriage, GP and IPR.

The parties separated in 2007, though there was a dispute over when. Elizabeth said it was in July, Gary said it was in December. The court would ultimately agree with Elizabeth and rule that the date of separation was in July. In 2008, a refinance of real property owned by GP resulted in Gary receiving a partnership distribution, in two installments, amounting to $137,000. Gary had met a man at a "course at school" about "being the best you can be" who convinced Gary to loan him $120,000 at an interest rate of 10 percent per month in order to develop a cell phone application which would tell customers which businesses in their zip code would deliver food. The money was never paid back.

In January 2008, Elizabeth filed for dissolution. In March 2010, Gary discharged his counsel and began representing himself. He was still representing himself when trial began in December 2010. After one and one-half days of trial, Gary found an attorney to represent him for the rest of the trial. At the time his trial attorney took over, Elizabeth's counsel was in the midst of taking the testimony of Elizabeth's forensic expert. Trial finished in January 2011. Gary's newfound counsel made a new trial motion. The new trial motion was denied in April 2011.

Several weeks after the conclusion of what the trial judge orally characterized as a "horrendous trial," the trial judge provided the parties with a thorough statement of decision. The judge ruled that the community had a 50 percent interest in the Ridgewood property. Its fair market value was $560,000, the debt on it was $482,242, yielding a net equity of $77,758. Of that net equity, Gary was to pay Elizabeth her one-fourth share, namely $19,439. (Gary was to pay Elizabeth any increased proportional share in the event the house sold for more than $560,000.)

The trial judge further concluded that Gary had received $137,000 of GP's funds, postseparation, lost it, and should be charged for Elizabeth's half of the community share, amounting to $68,500. The trial judge concluded there was "no believable evidence" that Gary had paid back the funds.

Finally, the trial judge ruled that Gary's conduct during the litigation was such as to merit sanctions under section 271. In an oral statement by the judge made on February 25, 2011, the judge enumerated the reasons for the sanction order: Gary had withdrawn community funds for projects without telling Elizabeth. He rented out the family house without telling her. He ignored filing deadlines and property declaration exchange requirements. He waited to the last day of trial to file his income and expense declaration. His bookkeeping was so bad that "no one could tell anything in terms of what the income and expenses" were of the various properties owned by the community businesses. Elizabeth had to make several motions to obtain discovery. Gary delivered 15 boxes of documents to Elizabeth's forensic accountant just three weeks before trial. The judge determined that "$40,000 is an appropriate sanction," to be paid at the rate of $750 a month.

Judgment was filed March 29, 2011. There was a new trial motion filed on April 1. The new trial motion was denied May 20. The notice of appeal was filed May 26, 2011, making the appeal timely.

DISCUSSION

1. Waived Issues

a. joinder of GP and IPR

Gary made no effort in the trial court to join GP or IPR to the dissolution. He has therefore waived any argument on appeal to the effect that the trial court should have done, on its own, what he never asked it to do in the first place. (*Baugh v. Garl*

(2006) 137 Cal.App.4th 737, 746 ["Points not raised in the trial court may not be raised for the first time on appeal"].)

b. the claimed $140,000 separate property reimbursement

There is no question that the Ridgewood property was one-half community property (the half received from Gary's parents in 2003) and one-half Gary's separate property. Accordingly, the trial judge took one-quarter of the property's net equity (almost $80,000) as it stood at the time of trial, and awarded Elizabeth one-quarter of it (almost $20,000).

On appeal, Gary argues that the trial judge ignored a putative $140,000 separate property "contribution" he made to the property. Here is his argument: In 2003, the property was worth $440,000. Gary's parents gave their half to the marital community as a condition of allowing a refinance that yielded $300,000. Ergo there was still $140,000 worth of equity at the time of the change in title and refinance. Gary's half of that $140,000 was $70,000, which he, in effect, contributed to the property and was therefore entitled to recover under section 2640. In awarding Elizabeth one-quarter of the existing equity at the time of trial, Gary says that the trial judge ignored the rule of decision in *In re Marriage of Walrath* (1998) 17 Cal.4th 907 (*Walrath*), a case construing section 2640. The net effect of his argument is that he should have been awarded at least $70,000 of the almost $80,000 in net equity in the property.

The argument was never raised to the trial court, a point practically conceded in his reply brief, which admits Gary never mentioned the $140,000 figure in court.

We need only add two things. First, while the record contains a copy of Gary's new trial motion filed April 1, the $140,000 theory was not articulated. If Gary had somehow raised the issue at trial, his new trial motion would have been the perfect chance to remind the trial court of any error.

Second, even if the issue had been raised, *Walrath* would be of no benefit to Gary under the circumstances of this case. *Walrath* ruled that a spouse may obtain reimbursement under section 2640 *not only* for separate property contributions to an original acquisition of community property, but also for property "acquired later with funds traceable to" that "original acquisition." (See *Walrath*, *supra*, 17 Cal.4th at p. 925 (conc. & dis. opn. of Kennard, J.).) Gary does not argue for any traceability of the claimed $140,000 contribution here. (He just wants at least his half of the $140,000 credited to him as regards the Ridgewood property.) In any event, he never gave the trial court a chance to consider his argument. (See *People v. Saunders* (1993) 5 Cal.4th 580, 590 [""""it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial""" (original italics)].)

2. Payback of the $137,000

There is substantial evidence that Gary received two distributions of GP funds totaling $137,000 in 2008, after separation. There is no dispute over the community nature of the distribution. Gary argues that the trial court ignored evidence he had paid most of the money back.

The evidence of repayment is this: (1) Gary's testimony before the trial court, (2) his own exhibit "S," which is a list of checks showing payments from Gary's Bank of America account to GP, and (3) his own exhibit "T," which is another list of checks to GP, including several which appear to show payments totaling $21,000.

As to (1), the trial court was certainly not obligated to believe Gary's testimony, even if otherwise uncontradicted. (See *Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 ["The trier of fact . . . is the sole judge of the credibility of the witnesses [and] may disbelieve them even though they are uncontradicted . . . ."].) Moreover, the very nature of Gary's testimony undercut any veracity it otherwise might

have, because it made no attempt to establish income and outgo that even remotely approached $137,000.

We quote the relevant testimony here: "I sold everything I have. I had a Jeep that I bought when I was in the Navy and I've had it for 20 years and restored it. I had 60,000 invested in it and I sold it for 20 grand. I had four go-karts when I got married and I sold them and parts and the parts and things I had with those. They are gone. [¶] Anything I could return to Costco or -- I did some side jobs like we had a fence that rotted out and we had a bid for 8,000 to repair the fence. My friends who knew this situation helped me rebuild the fence. So we charge the partnership, I think 6,500 or 7,000. So the partnership saved money and I was able to pay that back. The Angel tickets I had, I sold them. The playoff tickets I sold. Anything that wasn't nailed down that I had that I owned has been sold." He quickly added, "Plus I borrowed money too from family and friends to help pay back."

This testimony is too indefinite to establish, as a matter of law as against disbelief by the trier of fact, any sort of payback, either directly to the community or indirectly to the community via GP. Indeed, almost all his points (sale of go-karts, returns to Costco, valuation of fence repair, sale of Angel tickets) practically invite disbelief because of their undocumented nature.

That leaves (2) and (3), respectively exhibits S and T. Each belies any theory that the funds involved were to "repay" the *marital community* for funds squandered on an improvident loan. Exhibit S is supported by copies of the actual checks from Gary's "3732" bank account to either his partner Craig Goldman (the "G" in GP) or to "GP Partnership." With the exception of four checks (numbers 9221 for $4,000, 9227 for $5,000, 9231 for $5,000, and 9261 for $7,000), all the checks indicate they are a "capital contribution." The four exceptions say they are for loan repayment. Exhibit T shows three checks from Gary's 3732 account in the period March to May 2010 all denominated "Capital Contribution."

In sum, nothing on the face of exhibits S and T compels the conclusion that the payments from the 3732 account were *repayments to the community* for money wasted on the loan to the cell phone application entrepreneur. A capital contribution to a separate business entity is by definition an investment, not a repayment of money to the marital community already distributed from that business entity. And the small total of the four checks labeled loan repayment ($21,000) undercuts any theory that the $137,000 distribution was a "loan" from GP that Gary was paying back.

3. The $40,000 Sanction Order

a. notice

Gary argues he had no notice of Elizabeth's request for sanctions. Not so. At the very least she included a request for attorney fee costs under section 271 in her trial brief. That brief was served on Gary by courier on December 21, 2010, which was more than a week before trial began.

b. financial burden

Gary points to Elizabeth's ability to pay her own fees. The argument is of no merit given that the $40,000 fee order was imposed under section 271, which by its terms says it is independent of the moving party's financial need. While the statute says that "the court shall take into consideration all evidence concerning the parties' incomes, assets and liabilities," it also says: "In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award."

Gary asserts that $40,000 is, on balance, an unreasonable financial burden on him. (See § 271, subd. (a) ["The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed."].) There was enough evidence, though, to place the trial court's

figure within the bounds of reason, particularly given that the award was made payable in installments of $750 a month. Gary was awarded a three-quarters interest in the Ridgway property. Three quarters of the net equity of $77,758 in Ridgewood amounts to $58,318.50. His own income declaration showed $3,742 income per month. The trial judge noted that, given the nature of his work as a property manager, he receives free rent and the use of an office, which the court valued at $1,500 a month. We might add that he retains a quarter interest in GP. Elizabeth's property declaration asserted a net value of about $275,000 in the various interests held by GP, which would mean the value of Gary's interest would be around $69,000. There was thus enough in the way of assets and income for the trial court to reasonably conclude that Gary could accommodate a $40,000 penalty, even on top of the $34,000 or so equalization payment he would also be required to make.

c. *merits*

Finally, Gary argues that the sanction was itself arbitrary and capricious. Again, the argument is meritless. The very disorganized nature of Gary's case imposed considerable costs on Elizabeth. He ignored declarations of disclosure. He produced 15 boxes of documents within weeks of the trial for Elizabeth's expert to examine, putting her forensic account under undue pressure, particularly given that the relevant document request was about two years old. He failed to file a trial brief. He filed his income and expense declaration on the *last day* of trial. His trial presentation -- which the trial judge noted was not his attorney's fault, having been brought in at the last minute -- was so disorganized that on several occasions the trial judge expressed frustration with its incomprehensibility. Here are some examples: "The court: I don't know what we're doing here" (referring to Gary's apparent attempt to trace certain assets); "The court: . . . this is just confusing," (referring to evidence that funds were constantly going back and forth between IPR and GP); "The court: "This case has been confused enough," (making

overall comment on trial); "The court: "I have no idea and neither do you as to what he was doing," (apparently referring Gary's attempt to show he had paid back the $137,000); and "The court: [this has been] a horrendous trial that we had to put up with," (referring how Gary's lack of a trial brief led to a disorganized presentation at trial).

DISPOSITION

The judgment is affirmed. Elizabeth shall recover her costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.